APPEAL BOARD/AGENCY SHOP DEVELOPMENTS — 2002
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2001 Agency Shop cases: No Odyssey-- Just Odds and Ends

Legendary director Stanley Kubrick did not live to see whether the technological advances portrayed in his film of Arthur C. Clarke's *2001: A Space Odyssey* would come to pass on schedule. He died in 1999 before finishing his last project, *Artificial Intelligence*, another film with a technological theme. Steven Spielberg took over from Kubrick and directed that movie, released, coincidentally, in 2001. Kubrick's masterwork premiered in 1968, the same year the New Jersey Legislature enacted the public sector collective negotiations laws.

Back then one didn't have to be a rocket scientist to work out public sector union security issues. Unions could take dues only from their members as union shops and agency shops were illegal. See *N.J. Turnpike Employees' Union v. N.J. Turnpike Auth.*, 123 *N.J. Super*. 461 (App.Div.1973), aff'd 64 *N.J.* 579 (1974).

Last year's union security cases set little new law. They highlight the practical issues arising from agency shop systems. The opinions also reflect a trend toward applying the same legal principles to both public and private sector agency shop disputes. The decisions interpret the U.S. Supreme Court cases listed below, one of which involves the "craft" employees belonging to the Screen Actors Guild. Spielberg and Kubrick have "supervised" many SAG members, including some who recently received "Oscar" bonuses.

1. *Ellis v. BRAC,* 466 *U.S.* 435 (1984).

2. *Chicago Teacher's Union v. Hudson*, 475 *U.S.* 292 (1986).

3. *CWA v. Beck*, 487 *U.S.* 735 (1988).

4. *Lehnert v. Ferris Faculty Association*, 500 *U.S.* 507 (1991).

5. *Air Line Pilots Association v. Miller*, 523 *U.S.* 866 (1998).

6. *Marquez v. Screen Actors Guild,* 525 *U.S.* 33 (1998).

Private Sector

***UFCW v. NLRB*, 249 *F.*3d 1115 (9th Cir. 2001), reh. en banc granted, 265 *F.*3d 1079**

In a case where a decision by the full Court of Appeals is pending, the Ninth Circuit reverses the NLRB and rules that the agency must apply *Ellis* which holds that outside organizing activities cannot be charged to non-members. The NLRB held that two UFCW locals did not commit unfair labor practices when they assessed non-members a fee to defray the cost of organizing employees of companies which were competitors of the nonmembers' employers. In a third UFCW case the Court holds that another local violated *Beck* by telling new employees that they must become full members.

***Quick v. NLRB*, 245 *F.*3d 241 (3d Cir. 2001)**

Quick, a former official of the Graphic Communications International Union at a prior job, resigned from the Union and sent a letter advising it that he should thereafter be obligated to pay no more than "financial core" fees. The Union continued to assess full dues and instituted legal action to collect the amounts. Interpreting the union security clause of the collective bargaining agreement, the NLRB held that as written, it furnished no basis to collect any fees from employees who had resigned from the Union. The NLRB ruled that the Union violated the employee's rights under *Beck* and *Marquez* and committed an unfair labor practice when it assessed Quick full union dues following his resignation and had dues deducted from his paycheck. On appeal, the Court affirms the NLRB decision but rejects Quick's assertion that attorneys' fees should be part of the make-whole remedy. The National Right to Work Legal Defense Foundation had volunteered to represent Quick without any cost to him. The Court holds that only a person aggrieved by an unfair practice can recover, as part of a make whole order, the costs of defending against unlawful action. As Quick was the aggrieved party and did not incur any personal expense, he is not entitled to relief.

***Mohat v. NLRB*, 2001 *U.S. App. LEXIS* 464, 166 *L.R.R.M.* 2256 (6th Cir. 2001)**

After his union declined to return the portion of his dues used for non-chargeable activities and did not comply with his request for a *Beck* notice, Mohat resigned his

membership and sought to revoke his dues authorization. The employer continued to deduct full dues. The NLRB's complaint did not address the *Beck* issue. On appeal, Mohat also asserted that the union security clause was invalid under *Marquez* which was decided after his case was filed with the NLRB. The Court does not allow the challenge as it was not raised below, and also holds that the General Counsel's refusal to issue a complaint on the *Beck* notice issue was unreviewable. The Court reverses the NLRB and holds that the employer committed an unfair labor practice when it continued to collect full dues after he had revoked his authorization.

***IBT Local 166 and Penrod*, 333 *NLRB* No. 141 (2001)**

The NLRB reconsiders this dispute on remand following *Penrod v. NLRB*, 203 *F.*3d 41 (D.C. Cir. 2000). In accordance with the appeals court ruling the NLRB finds the Union committed an unfair labor practice by failing to adequately inform the charging parties of their *Beck* rights and failing sufficiently explain their expenditures and those of affiliates. The Union was ordered to furnish the nonmembers with copies of the schedules and "breakdown" referred to in an auditor's report, as well as a list of its major activities and the percentages of each activity that it considers to be chargeable and non-chargeable.

***International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* 337 *NLRB* No. 36 (2001)**

The NLRB crafts a new remedy following a partial remand in *Thomas v. NLRB*, 213 *F.*3d 651 (D.C. Cir. 2000). The Court had agreed with the NLRB that discharging a nonmember for nonpayment of dues violated the Act where the *Beck* notice given to the employee had been deficient. The new order requires the Union to affirmatively ask the employer to reinstate the employee. The employee's back pay claim is referred to compliance proceedings.

Public Sector

***Carlson & Morack, v. United Academics, AAUP/AFT/APEA AFL-CIO,* 265 *F.*3d 778 (9th Cir. 2001), pet. for *cert.* pending**

Nonmember faculty at the University of Alaska appealed a refusal to treat their agency shop fee challenge as a class action. The district court found that the AAUP's notices

violated *Hudson* but ruled that non-members could be treated differently based upon whether they accept the reduced fee or seek to use objection procedure. Holding that corrected notices issued by AAUP mooted that issue, the Court holds that the two-tiered system was proper. It also holds that the possibility that an arbitrator might increase the fee did not violate *Hudson*.

***Foster v. Mahdesian,* 268 *F.*3d 689 (9th Cir. 2001)**

Reversing a U.S. District Court ruling, the appeals court holds that a superintendent of schools is not responsible for checking the sufficiency of a *Hudson* notice, issued by National Education Association affiliates to nonmember public school faculty members.

***Cummings v. Connell*, 177 *F.Supp.* 2d 1060 (E.D. CA 2001)**

Employees, represented by, but not members of, the California State Employees Association, sue the both the CSEA and the State. They assert that the CSEA's fair share fee notices violate *Hudson* and that the indemnification agreement in the State-CSEA contract violates public policy. The court holds that CSEA's notices were inadequate because they did not provide specific financial information and because a copy of the audit of CSEA expenditures was not sent to non-members. The CSEA's escrow was also inadequate as it only covered member-only benefits and no other non-chargeable costs (e.g. lobbying which *Lehnert* held not to be germane to collective-bargaining activity). The Court orders that the non-chargeable portions of the fee be refunded to all class members. Noting that *Miller* requires an objector to at least identify the expenditures it believes are not chargeable, the Court accepts the CSEA's calculation that 27 per cent of the fee is non-chargeable. The Court holds that the plaintiffs lack standing to challenge the validity of the indemnification clause.

***Edwards v. Indiana State Teachers Association*, 749 *N.E.*2d 1220 (Ind. App. 2001)**

Several teachers sought to resign their Association memberships by not sending in updated membership cards and by phoning the payroll clerk to stop dues deductions. A written revocation during a 30-day window period was required by the Association's constitution. Citing both public and private sector decisions issued by federal appeals courts, the Court holds that the procedure does not violate *Hudson* and that the Association has standing to maintain a lawsuit to recover unpaid dues.